No. 13,079

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

Petition for Rehearing

HJALMAR B. LANDOE,
Attorney for Appellee.

Filed: 1952

.....Clerk.

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Comes now the Defendant and Appellee, DONALD CORCORAN, and petitions the Court for a re-hearing upon the following grounds:

That the opinion of the Circuit Court of Appeals in reversing the order of the Judge of the United States District Court, dismissing the above entitled cause and remanding said cause for trial, is wrong in principle and places the Ninth Circuit in conflict the great weight of authority on the question of when an issue shall be submitted to a jury and authorizes an appellate court to draw inferences and to speculate on the meaning of evidence which produces mere conjectures.

Argument

The established rule in Montana is that evidence producing mere conjecture does not satisfy Plaintiff's burden of affirmatively proving allegations against Motion for non-suit.

Stiemke vs Janovich et al
72 Mont. 363, 233 Pac. 904

In order to hold defendant liable, his wrongful acts or conduct must have been the procuring or controlling cause of the enticement or alienation.

See Corpus Juris Secundum,
Husband and Wife, para. 669.

Plaintiff failed to offer in evidence a single fact which in itself tended to prove or from which a fair inference could be drawn which could satisfy the burden upon the plaintiff to show that the conduct of the defendant Corcoran was the controlling cause of the alleged alienation of affections.

In this respect we respectfully remind the Court that Plaintiff's evidence admits that Plaintiff and his wife were living apart when defendant met her and Plaintiff's evidence further admits (by inference) that Plaintiff's marriage was a marriage of necessity, brought about by the pregnancy of Plaintiff's wife, who had a miscarriage two months after the marriage (See Tr. p 55-56); thereafter the evidence as adduced on cross examination clearly shows that Plaintiff and his wife were not living together in harmony, but on the contrary that the conduct of the Plaintiff was such as to indicate a total lack of filial devotion which culminated in the decision of Plaintiff's wife (Eunice), to announce to the Plaintiff that she was going to get a divorce, which occurred on Christmas eve, 1947.

There is nothing in the record that even remotely suggests that the defendant enticed Eunice to leave the Plaintiff, nor that at any time did he force or urge his attentions upon her.

In other words, no matter what one might speculate the facts to be, the record is barren of any evidence to show that the Defendant was a controlling influence in effecting

the alienation; and that a conclusion to that effect must necessarily be based upon speculation.

In the case of Berger vs Levy (Calif.) 43 Pac. 2nd, page 610, the Court reasoned the matter thus:

> "It is well settled that there is no ground for action where a spouse voluntarily gives his or her affection to another, the latter doing nothing wrongfully to win such affection; that is to say, in order to establish liability, it must be shown that the defendant is the enticer, and mere proof of abandonment, or that the husband or wife may be maintaining an improper relation with another, is not sufficient."

The facts in the case of Moelleur vs Moelleur, 55 Mont. 30, which is cited by the Court, is to be distinguished from the evidence in the record in this case in that in the Moelleur case the evidence on the part of the plaintiff showed that the plaintiff and her husband, Dr. Moelleur, were living together as husband and wife in the same community where the defendant (then Mrs. Mary Reynolds) resided; that said Mrs. Reynolds knew of the marriage relation and during said relationship expressed her fondness for Dr. Moelleur and expressed her desires to be with him and made the admission that she was responsible for Dr. Moelleur filing suit for divorce against the plaintiff. That is quite a different situation compared to the record in the instant case wherein there is no evidence of so much as a conversation between the defendant and the estranged wife of the pliantiff and that the defendant did not even know that the plaintiff's wife was married until several months after plaintiff's wife had separated from him.

This distinction is pointed out for the reason that the

record ought to furnish something more than mere speculation and guess work as a basis for any inference that the defendant enticed the wife of plaintiff from him and to support the position that the defendant forced his attention upon her.

Admittedly, plaintiff's case relies entirely upon indirect or circumstantial evidence.

Indirect evidence is defined by Revised Codes of Montana, 1947, as follows:

> "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact from which the fact in dispute is inferred."
>
> 93-301-10-RCM 1947

Satisfactory evidence is defined as follows:

> "The evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."
>
> 93-301-13 RCM 1947

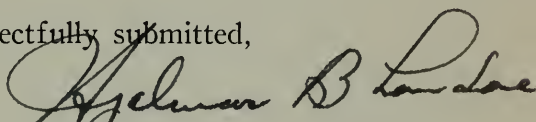
The evidence of the plaintiff is that upon a number of occasions the wife of the plaintiff and the defendant were seen together. That is all. From this fact is it reasonable to infer that the defendant was the aggressor in forcing his attentions upon her as against the equally reasonable inference that she was the aggressor and forced her attentions upon the defendant?

Conclusion

Our contention is, to repeat, that since this is a circumstantial evidence case, the question to be decided is, is there any evidence in the record which justifies an unprejudiced mind in believing to a moral certainty that the defendant, DONALD CORCORAN, was the aggressor and enticer and that he was the controlling cause for alienating the affections of Eunice from the plaintiff?

We respectfully submit that the evidence offered does not justify such an inference and therefore the defendant should not be subjected to the expense and ordeal of another trial.

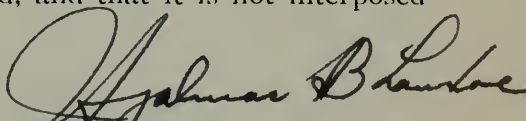
Respectfully submitted,



HJALMAR B. LANDOE,
Attorney for Appellee.

Certificate

The undersigned counsel hereby certifies that he prepared the foregoing Petition for Rehearing; that in his judgment it is well founded, and that it is not interposed for delay.



HJALMAR B. LANDOE,
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